IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-5655

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

CHARLES E. THOMPSON, Warden
Mecklenberg Correctional Center,
Boydton, Virginia; EDWARD W. MURPHY,
Director, Virginia Department of Corrections;
MARY SUE TERRY, Attorney General of the
Commonwealth of Virginia; and the
COMMONWEALTH OF VIRGINIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE VIRGINIA SUPREME COURT

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September 3, 1991

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Questions Presented

1. Whether, under this Court's ruling in Gardner v. Florida, the failure to provide a capital defendant with the opportunity to rebut the prosecution's misleading statements to the jury suggesting that the defendant would be eligible for parole if sentenced to life renders the death sentence constitutionally unreliable?
2. Did the Virginia court's arbitrary application of its procedural bars violate defendant's Fourteenth Amendment right to due process of law?
3. Whether O'Dell's court-ordered psychiatric examination, which evaluated only his ability to stand trial and not his capacity to represent himself, violated the standard of Faretta v. California and further, whether Drope v. Missouri requires that a trial court order further psychological examination when a defendant proceeding pro se in a capital trial exhibits severe emotional disturbance?
4. Did the state court's dismissal of O'Dell's discretionary state habeas appeal rest on a sufficiently independent or adequate state ground?

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OPINIONS BELOW

The Orders of the Circuit Court of Virginia Beach dismissing the petition for a writ of habeas corpus, dated January 31, 1990, October 1, 1990, and November 26, 1990, are not officially reported. The Orders are reprinted at pages a19, a56, and a69, respectively, of the Appendix to this petition. Portions of the transcripts from hearings reflecting either findings of fact or conclusions of law follow the corresponding orders. The unreported orders of the Virginia Supreme Court dismissing O'Dell's Petition for Appeal and denying rehearing are reprinted at pages a95 and a97 respectively, of the Appendix.

JURISDICTION

On April 1, 1991, the Virginia State Supreme Court entered judgment denying and dismissing Petitioner's appeal from the denial of his petition to the Circuit Court of the City of Virginia Beach for a writ of habeas corpus. On June 7, 1991, the Virginia Supreme court denied a timely motion for reargument and petition for rehearing. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL AND STATUTORY
PROVISIONS AT ISSUE

This case invokes the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It additionally involves the Code of Virginia §§ 8.01-654, 17-116.05:1(B), 19.2-169.1,.5, 53:1-151(B1) and Virginia Supreme Court Rules 5:9, :17, :21 and :22. The text of these provisions is set forth at pages a1-a13 of the Appendix to this petition.

STATEMENT OF THE CASE

On September 10, 1986, Joseph Roger O'Dell, III, after a six week arduous trial during which he proceeded pro se, was convicted of murdering Helen Schartner in a field behind the After Midnight Club in Virginia Beach, Virginia. On November 13, 1986, he was sentenced to death. O'Dell has consistently maintained his innocence of the crime -- a claim buttressed by evidence obtained from DNA testing and presented in a state habeas corpus hearing.

The Public Defender's office initially represented O'Dell. Four months after his appointment, the attorney from the Public Defender's office was, over O'Dell's protest, granted permission to withdraw from the case because of a claimed potential conflict (2:2-9).[1] In August, 1985 Paul Ray, a practitioner who had never before tried a capital case, was then appointed to represent O'Dell.

A. O'Dell's Competency Examination.

In October 1985, the Commonwealth moved to have O'Dell examined by an independent court-appointed psychiatrist for the triple purpose of determining his sanity at the time of the offense, his competency to stand trial, and

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1 All unspecified citations are to the trial transcript. The transcript comprises 63 volumes, any portion of which is available upon request.

his future dangerousness as a possible aggravating factor (3:3).[2] The Commonwealth intended to use the results of the evaluation in the sentencing phase, should one occur (3:3, 7).

O'Dell was unwilling to undergo a forensic evaluation because of the possible prejudice resulting from the conclusion regarding his "future dangerousness" (3:2). O'Dell further objected to the evaluation because of his experience following a prior psychiatric examination in 1975, which diagnosed him as a paranoid schizophrenic. Ray, however, believed that O'Dell's erratic behavior necessitated a sanity and competency inquiry (3:2). Ray's acquiescence to the proposed evaluation propelled O'Dell to seek Ray's removal as his counsel (4:2). The Court postponed consideration of O'Dell's motion to proceed pro se pending results of a psychological evaluation.

The trial court specified that the evaluation should encompass O'Dell's competency to waive counsel and

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2 Virginia law requires that the jury unanimously find, at the minimum, one of two statutory aggravating factors, either that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society ["future dangerousness"] or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile . . . ." Va. Code Ann. § 19.2-264.2.

represent himself, in addition to his competency to stand trial and his sanity at the time of the offense (5:20).

Rather than select a qualified forensic psychiatrist, the court appointed Dr. Stanley J. Kreider, a psychiatrist whose practice extended only to therapeutic applications of psychiatry. Dr. Kreider had no formal forensic training nor had he ever conducted a forensic evaluation in connection with a criminal trial other than those performed in connection with Navy courts-martial. Dr. Kreider had never, in any jurisdiction, conducted an evaluation to ascertain whether a defendant had the capacity to waive his right to counsel and represent himself.

Virginia law requires that an evaluating psychiatrist review, among other things, a summary of the reasons for the evaluation, statements made by the defendant to the police and at preliminary hearings and any relevant medical records. Va. Code Ann. §§ 19.2-169.1(c), 169.5(c).

The only information Dr. Kreider reviewed was that sent to him by Ray, who forwarded the court's order appointing Dr. Kreider as evaluator, a copy of Ake v. Oklahoma, 470 U.S. 68 (1985), a 1975 psychiatric evaluation of O'Dell, copies of the four indictments against O'Dell, and the victim's autopsy report. Dr. Krieder did not review any of the transcripts of preliminary hearings where O'Dell

expressed his suspicions about Ray and the Court system. The Commonwealth provided no materials whatsoever to Dr. Krieder.

Dr. Kreider interviewed O'Dell for one hour. He administered no formal psychological tests and conducted no more than a superficial investigation into O'Dell's social, mental, and neurological history. Dr. Kreider submitted a report to the Court explaining that he had examined O'Dell with regard to his mental state and the time of the commission of the crime and his competency to stand trial and assist counsel in preparing a defense. From this examination, Dr. Kreider concluded that O'Dell could "'make a voluntary and intelligent decision to waive his right to counsel and prepare his own defense' (6:2)." Rather than conduct an evidentiary hearing, the trial court read Dr. Kreider's naked conclusions into the record and declared that "[O'Dell] has a complete, clean bill of mental health (6:2-3)." The Court postponed consideration of O'Dell's motion to represent himself until other pending motions were addressed (6:3).

Following numerous conflicts between O'Dell and Ray, the court, without either ordering further psychiatric examination or making further inquiry into O'Dell's understanding of his waiver of counsel, granted O'Dell's third

motion to proceed pro se on December 18, 1985 (10:4-5). The Court nonetheless appointed Ray as "standby" counsel to advise O'Dell in what proved to be an unclear capacity.

Ray and O'Dell maintained a volatile relationship. At one point O'Dell warned that "I may fly off the handle and I might get shot or whatever and I don't want this gentleman [Ray] on my case (20:17)."

Even the Judge commented on O'Dell's "inability to emotionally control [himself] . . . in the court (22:44)." After hearing a particularly violent litany against Ray, the Judge informed O'Dell that "such statements concern me as to whether you are in fact in need of a reevaluation (23:21)."

At one point, Ray, acting "as an officer of the court," beseeched the court to hold

> a sanity and competency hearing for Mr. O'Dell. I believe it's crucial -- crucial from the events that have happened that he be re-examined by a psychiatrist and I will be glad to set forth for the record. There are several events which I believe would lead your Honor to determine that it is wise to do a sanity and competency hearing (23:30) (emphasis added).

Ray offered to reveal the information in camera (23:3). O'Dell objected to another evaluation (23:31). No further evaluation occurred.

B. The Commonwealth's Evidence at Trial.

The prosecution's case against O'Dell was purely circumstantial. The Commonwealth presented evidence that

tire tracks consistent with O'Dell's car were discovered in the area near Schartner's body, and that O'Dell and Schartner patronized the same bar on the night she was killed. However, there was no evidence that O'Dell knew Schartner, met Schartner that night, or ever spoke with her (44B:14). In addition, the evidence showed that O'Dell left the bar considerably later than Schartner (49:37).

The prosecution's attempt to link O'Dell with the victim was grounded on analysis of dried blood samples taken from O'Dell's soiled clothing which his estranged girlfriend had turned over to the Commonwealth. Not only was the test, referred to as multisystem electrophoresis, highly controversial, but the technician had completed her training in the method only two months prior to her unsupervised analysis of the evidence against O'Dell (47B:63, 76; 48B:29-30). Moreover, the photographs of the electrophoretic gels were of poor quality, rendering any analysis by defense experts difficult.

Although the testing method was controversial and the evidence critical, the Commonwealth failed to take precautions to preserve the evidence for retesting by the defense (10:65). Nor did the Commonwealth take steps to ensure that the stained clothes were uncontaminated by other sources, in particular the bloodied clothes of the victim,

prior to being tested. Notwithstanding these serious reliability problems, the trial Judge, who had previously denied O'Dell's request for a hearing on the reliability of the evidence (16:26-30, 16:33-39), allowed the technician to opine that the blood samples taken from O'Dell's shirt and jacket were consistent with samples taken from the victim (48:B:75-77).

Additionally, in a maneuver described by the trial court as "dirty pool" (47A:45), the Commonwealth called a purported jailhouse informant, Steven Watson, to the stand without any warning to the defense. The trial court, however, denied O'Dell's proffer of evidence that Watson offered to manufacture evidence in other trials as a means of evading jail (47C/B:3).

Watson testified that while O'Dell and he had been incarcerated in the Medical Block of the Virginia Beach city jail, O'Dell confessed committing the Schartner murder and described the circumstances leading up to her death. However, Watson's testimony conflicted with the Commonwealth's theory of the case and was also at odds with the testimony of eyewitnesses present at the County Line on the night of Schartner's murder. Contrary to Watson's testimony, not one of the eyewitnesses testified that O'Dell talked to or even knew Schartner, much less that he bought her drinks or left

the bar with her. In fact, the eyewitness testimony was that each left alone (49:35-44).

Moreover, contrary to Watson's emphatic denial that he negotiated a deal with the district attorney's office in exchange for testifying, shortly after Watson testified he was permitted to plead guilty to outstanding charges of breaking and entering, for which he received three years probation.

The prosecution offered no other evidence against O'Dell.

O'Dell presented an alibi defense. Upon leaving County Line, O'Dell proceeded to a number of night spots, ultimately ending up at the Brass Rail, where he became embroiled in a fight with two individuals. The general manager of the Brass Rail, a witness for the Commonwealth, testified that a fight had occurred in the parking lot of the Brass Rail on the night of Schartner's murder (48A:35). Although the manager did not observe the fight, he saw O'Dell in the parking lot after the altercation (48A:37). He asked O'Dell if "everything was all right because he appeared -- he was like -- like he had just got in a fight (48A:37)."

O'Dell has always maintained that the blood on his clothes was from a fight he had with a sailor, John Nutter.

During his closing argument in the guilt phase, the prosecutor repeatedly emphasized the "match" between the blood on O'Dell's clothes and blood from the victim. The jury convicted O'Dell of capital murder.

C. The Prosecutions Statements Regarding O'Dell's Parole Eligibility.

The prosecutorial strategy during the penalty phase was designed to convey to the jurors that imprisonment was ineffectual to curb O'Dell's criminal behavior. The unspoken but clear implication was that nothing short of death would keep O'Dell out of circulation.

In furtherance of this strategy, the prosecution highlighted O'Dell's past parole releases. The Commonwealth cross-examined O'Dell in exacting detail about these previous releases and pointed out that O'Dell served only seven months on a 1961 sentence, and only thirteen months on his next sentence, and was on parole at the time of Schartner's murder (56:142-143). The Commonwealth raised the spectre of O'Dell's parole again in its closing argument when it alluded to Florida's mistake for paroling O'Dell in 1982 (56:202).

O'Dell sought to counter the prosecutor's false statements with a jury instruction or testimony that he would be statutorily ineligible for parole if sentenced to

life imprisonment. The Virginia Code, § 53.1-151(B1), provides that

> Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

O'Dell had previously been separately convicted of the offenses enumerated in the statute. However, each time O'Dell sought to introduce his statutory parole ineligibility he was rebuffed by the Court (56:88, 133). Yet, prior to trial, the trial judge had described evidence of parole ineligibility as a "very, very relevant matter" in a capital case. The judge stated that it "could become a very key issue as to whether the jury should be told at some point what effect [parole] would have on [the defendant], so just bear that in mind. It's going to be difficult problem for the Commonwealth, [the defendant], and the Court if it becomes an issue; and it very well may" (31:61-62).

The jury sentenced O'Dell to death without knowing that O'Dell would not be eligible for parole if sentenced to life.

O'Dell was represented by counsel on appeal. The Supreme Court of Virginia affirmed the conviction and sentence of death on January 15, 1988. O'Dell v. Commonwealth

of Virginia, 234 Va. 672, 364 S.E.2d 491 (1988), mod'd on rehearing, Record No. 861219 (Va. Apr. 1, 1988). Appellate counsel, along with the firm of Paul, Weiss, Rifkind, Wharton & Garrison ("Paul, Weiss") filed a petition for a writ of certiorari to the United States Supreme Court on O'Dell's behalf. The petition was denied. 448 U.S. 871 (1988).

D. State Habeas Corpus.

Attorneys from Paul, Weiss, along with Andrew R. Sebok, an attorney appointed by the Virginia Court, filed a petition in the state court for a writ of habeas corpus. The petition, as amended, raised numerous claims of constitutional dimension including:

1. The blood serology tests were conducted improperly, and the failure to exclude evidence based on these tests was constitutional error. During a hearing on the habeas petition, O'Dell introduced evidence based on DNA testing -- technology unavailable at the time of Mr. O'Dell's trial and conviction -- which invalidated the principal evidence used against him at trial, the purported "match" between the blood stains on O'Dell's clothing and the victim's blood. The results of the testing conclusively demonstrated that the blood found on Mr. O'Dell's shirt

either was not the victim's or could not reliably be linked to the victim, a fact uncontested by the Commonwealth.[3]

2. The trial court's refusal to allow O'Dell to rebut the prosecutor's assertions that he would be eligible for parole if sentenced to life imprisonment rendered the death sentence unreliable. Gardner v. Florida, 430 U.S. 349 (1977).

3. The trial court granted Mr. O'Dell's request to relieve Ray without either making an adequate inquiry into whether Mr. O'Dell was competent to waive counsel, as required under Faretta v. California, 422 U.S. 806 (1975), and its progeny or ensuring that the appointed psychiatrist was qualified to conduct the forensic evaluation. Further, the Commonwealth failed in its statutory duty to provide necessary materials to the evaluating psychiatrist. Finally, the Circuit Court, after granting O'Dell's motion to proceed pro se failed to properly monitor O'Dell's capacity to represent himself.

O'Dell also raised numerous other claims in his first petition. O'Dell subsequently filed an Amended Peti-

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[3] A transcript of the October 23, 1990, evidentiary hearing on the petition (hereinafter "October 23 hearing") is available upon request. Portions of the transcript, including the court's findings of fact and conclusions of law, are reprinted at pages a72-a94 of the Appendix to this petition.

tion and a Second Amended Petition.[4] The Circuit Court, on January 31, 1990, dismissed all but two of the twenty-three claims in the Second Amended Petition. The court applied procedural bars enunciated in Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970) (claim raised on appeal), and Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1975) (claim not raised on appeal), to dismiss the majority of these claims.

Other grounds for relief alleged in the Petition were dismissed on the merits without benefit of an evidentiary hearing.

On October 23, 1990, the Circuit Court of Virginia Beach held an evidentiary hearing limited to (1) O'Dell's claim that the procedure by which he was deemed competent to waive counsel was constitutionally insufficient and (2) the presentation of results from recent DNA analysis demonstrating error in the blood analysis at trial. The habeas court applied a res judicata bar to the serological evidence and entered factual and legal findings dismissing the competency claims.

Counsel to O'Dell filed a timely notice of appeal from the dismissal of the state habeas petition. Va. Sup.

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[4] A catalog of claims raised in the Second Amended Petition is included in the Appendix at page a14.

Ct. Rule 5:9. Believing the appeal to be "of right" counsel then filed a document entitled "Assignments of Error" (reprinted at p. a109 of the Appendix) within the statutory three month limitations period. On March 6, 1991 -- over one week after the last date for a timely filing, the deputy clerk of the Virginia Supreme Court and the attorney for the Commonwealth informed counsel that, in their view, a document entitled "Petition for Appeal" rather than a document entitled "Assignments of Error" was required to be filed in an appeal from the denial of a state habeas petition. At the same time the attorney for the Commonwealth informed counsel that he would not oppose O'Dell's supplementation of his filings with this additional document.

Two days later, counsel for O'Dell filed a motion for an order allowing him to perfect his appeal. The Commonwealth reversed its position and opposed the motion. On March 15, 1991, counsel for O'Dell filed a document entitled "Petition for Appeal." On April 1, 1991, the Virginia Supreme Court denied O'Dell's motion and rejected the appeal. The Virginia Supreme Court denied O'Dell's timely petition for rehearing on June 7, 1991.

REASONS FOR GRANTING THE WRIT

I.

THE TRIAL COURT'S REFUSAL TO ALLOW O'DELL THE OPPORTUNITY TO REBUT THE PROSECUTION'S MISLEADING STATEMENTS REGARDING HIS PAROLE ELIGIBILITY RENDERS THE DEATH SENTENCE UNRELIABLE

The death sentence meted to O'Dell is unreliable because of the trial court's refusal to permit O'Dell to rebut the prosecution's inaccurate statements and suggestions to the jury regarding O'Dell's eligibility for parole if sentenced to life. Gardner v. Florida, 430 U.S. 349 (1977). This Court should grant certiorari to vacate the decision of O'Dell's sentencing jury because it was based, in substantial part, upon "information which he [(O'Dell)] had no opportunity to deny or explain." Id. at 362 (Stevens, J). Allowing a death sentence to stand under these conditions violates the Eighth Amendment since the jury determined whether to impose the death sentence on the basis of inaccurate information as a result of the unconstitutional limitation on O'Dell's due process right. See id. at 360.

Moreover, in light of Virginia's inclusion of a defendant's future dangerousness as an aggravating factor in the death sentence determination, fundamental fairness unquestionably requires that O'Dell have the opportunity to rebut inaccurate information offered by the prosecution as

evidence of that aggravating factor. See Payne v. Tennessee, ___ U.S. ___, 111 S. Ct. 1407 (1991) (fundamental fairness dictates that the prosecution and defense are provided with equal opportunities to counteract the evidence put forth by the other in the penalty phase).

This Court has, consistently, reaffirmed its statement in Woodson v. North Carolina, 428 U.S. 280 (1976) that the "qualitative difference" between a death sentence and all other punishment requires a "corresponding difference in the need for reliability in the determination that death is the appropriate sentence." Id. at 305; see also Beck v. Alabama, 447 U.S. 625, 643 (1980); Green v. Georgia, 442 U.S. 95, 97 (1979).

It is axiomatic that the jury be provided with accurate and wide ranging evidence to ensure a reliable sentencing determination. See California v. Ramos, 463 U.S. 992, 1009 n. 23. In no case is this more essential than when, as here, the prosecution raises inaccurate propositions. Accuracy demands that a defendant be permitted to rebut, deny and explain information proffered by the prosecution. See id. at 1004 (explaining Gardner v. Florida).

Given the need for accuracy in the jury's determination of O'Dell's future dangerousness, the Virginia Court should have allowed O'Dell the opportunity to explain his

parole ineligibility to the jury once the prosecution opened the door on the subject. Rather, the trial court's rulings fueled the prosecutorial strategy by allowing the prosecution, over strenuous objection, to raise the spectre of O'Dell's parole.

Finally, any doubt in the jurors' minds regarding O'Dell's parole eligibility was arguably cast aside by the prosecutor's closing statement that "no sentence ever meted out to this man has stopped him, and nothing ever will except the punishment that I now ask you to impose. (56:204)"

The trial court's action directly contravenes this Court's pronouncement in Gardner v. Florida, supra. In Gardner, the petitioner had challenged the validity of his sentence because the trial judge, in imposing the death sentence, relied in part on information contained in a confidential presentence investigation report that neither the defendant nor his counsel had seen and therefore could not controvert. A plurality of the Court held that due process requires there be an "opportunity for petitioner's counsel to challenge the accuracy or materiality" of the presentence investigation report. Gardner, 430 U.S. at 356. The court vacated the petitioner's punishment, finding that he "was denied due process of the law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." Id. at 362 (emphasis added).

The rule of Gardner derives from the principle deeply embedded in American law -- that the adversarial system is the paramount means of promoting reliability in courtroom determinations. See id. at 360. On numerous occasions this Court has reaffirmed Gardner's central proposition -- a reliable verdict is only achieved through adversarialness in the courtroom. See, e.g., Skipper v. South Carolina, 476 U.S. 1, 5, n.1 (1986); California v. Ramos, supra, 463 U.S. at 1004; Presnell v. Georgia, 439 U.S. 14, 16 (1978); see also Gholson v. Estelle, 675 F.2d 734, 738 (5th Cir. 1982) (defendant's inability to challenge testimony on his future dangerousness violates Gardner).

Although this Court has not specifically evaluated a Gardner challenge based on a prosecutor's remarks regarding a defendant's parole eligibility, petitioner urges the Court to adopt the sensible approach articulated by the Fifth Circuit in Byrne v. Butler, 845 F.2d 501 (5th Cir.), cert. denied, 487 U.S. 1242 (1988).[3] The capital defendant

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[3] Petitioner does not seek the creation of a "new rule" within the meaning of Teague v. Lane, 489 U.S. 288 (continued...)

in Byrne, like O'Dell, claimed that the prosecutor made erroneous remarks suggesting that he could eventually be released on parole.[6]

However the trial court in Byrne, contrary to the judge presiding at O'Dell's trial, permitted defense counsel to state, on voir dire, that "the parole board was powerless to grant parole to a person sentenced to life imprisonment." Id. at 506. Although the trial court refused to allow the

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[5] (...continued)
(1989). A ruling that O'Dell's death sentence is unreliable because O'Dell could not rebut the prosecution's statement does not "break new ground" nor "impose a new obligation" on the State of Virginia. Id., 489 U.S. at 301. Rather, O'Dell's right to rebut the prosecution's inferences is dictated by this court's decisions in Woodson, Gardner and Ramos which were decided years prior to O'Dells conviction.

Moreover, the error claimed by O'Dell fits into the exceptions to Teague as it directly implicates his basic due process right which is central to the fundamental fairness and accuracy of the sentencing determination. See Saffle v. Parks, 494 U.S. 484, 110 S. Ct. 1257, 1263 (1990) (discussing exceptions to Teague).

[6] Under Louisiana law, however, the only sentencing alternatives available to the jury were either death or life imprisonment without the possibility of probation, parole, or suspension of sentence. Byrne, 845 F.2d at 508. The relevant Louisiana code provision states:

> Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury.

La. Rev. Stat. Ann. § 14:30(C) (1986).

defendant to further inquire into the venirepersons' understanding of "life imprisonment" and parole, the Judge overruled the prosecutor's objection to defendant's remark and "admonished the jury to disregard the attorney's depiction of the law and to concentrate instead on the law as given to them by the trial court." Id.

The defendant in Byrne attempted to argue that the prosecutor's objections and the trial court's admonishment rendered the verdict unreliable under Gardner. The Fifth Circuit rejected the Gardner claim on the following three grounds: (a) the prosecution failed to "directly interject the notion of pardon or commutation of sentence into the proceedings"; (b) Byrne's counsel was repeatedly permitted to explore the meaning of life imprisonment in front of the jury; and (c) at the time of the sentencing, the trial judge charged the jury that it "must now determine whether the defendant should be sentenced to death or to life imprisonment without benefit of probation, parole or suspension of sentence." Byrne, 845 F.2d at 508, n.7 (quoting jury charge) (emphasis added in opinion).[7] Relying on all these

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[7] The Fifth Circuit also noted that "[t]he underscored phrase was uttered four more times by the trial court in the course of the charge." Byrne, 845 F.2d at 508, n.7.

factors, the court held Gardner to be "inapposite to the case at bar." Id. at 509.

The Byrne court implicitly developed parameters by which to judge a Gardner challenge based on a court's failure to allow defendant to respond to a prosecutor's inaccurate statements relating to defendant's parole eligibility. Once the prosecutor has interjected the notion of pardon or commutation of sentence into the proceeding, the trial court must either allow defense counsel to explore "the meaning of life imprisonment before the jury" or properly instruct the jury that the alternative to death is "life imprisonment without the benefit of probation, parole or suspension of sentence." A trial court's failure to ensure that the jury receives accurate information regarding a defendant's parole ineligibility through one of these specified alternatives, renders the verdict unreliable under Gardner.

O'Dell's trial judge failed to meet the Byrne criteria. The trial judge allowed the prosecution to elicit testimony from O'Dell and to make statements during his closing argument which sent a direct message to the jurors that O'Dell, if sentenced to life imprisonment, would be released on parole. At the same time, the judge refused to allow O'Dell to introduce evidence as to his statutory

ineligibility for parole. Finally, the trial judge failed to correct the imbalance when it refused a jury instruction on the Virginia law of life without parole. Accordingly, O'Dell's death sentence is unreliable under Gardner.

Certiorari therefore is necessary because the Virginia court's formalistic adherence to its prohibition on allowing evidence of a defendant's statutory parole ineligibility, even where the prosecutor raises the spectre that defendant's parole, is unconstitutional. Such a policy thwarts the proper functioning of the adversarial system which requires that a jury deciding on whether or not to impose the death sentence is not left to deliberate with unrebutted inaccurate information.

II.

VIRGINIA APPLIED ITS PROCEDURAL BARS TO O'DELL'S HABEAS PETITION IN AN UNCONSTITUTIONAL MANNER

The Virginia habeas court's erroneous application of its procedural bars enunciated in Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970) and Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1975), undermines the principle of comity underlying the exhaustion requirement of federal habeas corpus and denies O'Dell due process of the law. See Rose v. Lundy, 455 U.S. 509, 518 (1982).

Virginia law recognizes two principal procedural bars to the review of claims asserted in a habeas petition. Slayton v. Parrigan, supra, prohibits a petitioner from circumventing the appellate process by barring review of claims on habeas corpus that the petitioner neither objected to at trial nor raised an appeal. Hawks, supra, on its face prohibits a habeas petition from raising identical claims in successive habeas petitions; as applied by Virginia courts, however, it has been routinely used to strike from initial petitions any issue raised on direct appeal; Hawks and Slayton, as applied by the Virginia court to O'Dell's state habeas petition, has thoroughly stifled O'Dell's ability to exhaust his state remedies. As this Court has stated, "The doctrine of exhaustion of state remedies . . . presupposes that some adequate state remedy exists." Young v. Ragen, 337 U.S. 235, 238-39 (1949). This Court should grant certiorari to ensure that Virginia courts adhere to the principles of comity by providing O'Dell, and future criminal defendants, the opportunity to exhaust their federal and state claims in a state forum prior to applying for federal habeas corpus relief.

The Virginia habeas court erroneously applied Hawks to bar O'Dell from raising, in this, his only state habeas petition, any state and federal claims which had

previously been "considered" by the Virginia Supreme Court on his direct appeal, notwithstanding the fact that the Virginia Supreme Court had never ruled on the merits of certain claims, nor on the federal basis of others.[1] Likewise, the habeas court's application of Hawks foreclosed consideration of O'Dell's claims resting on "changed circumstances" in the nature of substantial new evidence obtained from DNA testing which not only legitimately placed the credibility of the Commonwealth's central evidence into doubt, but provides a solid basis for O'Dell's claim of innocence.

The Virginia Circuit Court's application of Hawks is manifestly not grounded in the law of the case. Even a cursory reading of Hawks reveals that the case provides no support for the proposition that claims raised in a state habeas petition are res judicata merely because a petitioner presented the same argument in his brief on direct appeal.

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[1] On direct appeal, the Virginia Supreme Court never addressed the merits of (1) O'Dell's arguments regarding the highly prejudicial admission of evidence relating to a wholly separate crime and (2) the trial court's improper restriction of the cross examination of certain witnesses. Nor did the Virginia Supreme Court address the federal basis of many claims raised by O'Dell on direct appeal, including two issues raised in this petition (1) O'Dell's claim that the exclusion of evidence of his statutory parole ineligibility was unconstitutional and (2) the trial court's improvident acceptance of O'Dell's request to waive counsel.

Rather, Hawks is meant to apply against defendants who abuse the writ of habeas corpus. The petitioner in Hawks "busily engaged in filing" numerous state and federal habeas petitions. 211 Va. at 91, 175 S.E.2d at 272. The petitioner's claims in Hawks had each been "rejected by more than one court of competent jurisdiction." Id. at 91, 175 S.E.2d at 272. This Court had twice denied Hawks certiorari to hear claims alleged in his prior state habeas petitions. Id. at 92, 175 S.E.2d at 272.

Rather than adopt a res judicata bar to claims raised in habeas petitions, the Hawks court adopted the federal rule which harmonized with Virginia Code § 8-605, thereby permitting Virginia courts to "reject repetitive habeas corpus petitions if the allegations have been previously decided on the merits and the ends of justice would not be advanced by further consideration." Hawks, 92 Va. at 95, 175 S.E.2d at 274 (citing Alford v. North Carolina, 405 F.2d 340, 342 (4th Cir. 1968), rev'd on other grounds, 400 U.S. 25 (1970) (emphasis added)).

The habeas court's erroneous application of Hawks and concurrent application of Slayton v. Parrigan, supra, creates a "damned if you do -- damned if you don't" approach to habeas corpus relief: a petitioner is barred by Hawks from raising a claim in a habeas petition if he properly

raises the issue on direct appeal, yet barred by Slayton from raising the claim if he failed to raise the issue on appeal. As Virginia provides no avenues of post-conviction review aside from habeas corpus, the court's application of Hawks and Slayton operates as a "one-two" punch foreclosing O'Dell from obtaining meaningful collateral review. The Virginia rule seriously undermines the principle of comity underlying the exhaustion requirement of federal habeas corpus, and is offensive to the Fourteenth Amendment.

A. Virginia's Application of Its Procedural Rules Ignores The Principles of Comity Underlying State and Federal Post-Conviction Review.

The exhaustion requirement of 28 U.S.C. 2254(b) is grounded in principles of comity. Rose v. Lundy, 455 U.S. 509 (1982). Exhaustion promotes the policy that states should, in the first instance, address and correct the violations of a state prisoner's federal constitutional rights. Coleman v. Thompson, ___ U.S. ____, 111 S. Ct. 2546, 2554-55 (1991). Foremost, the exhaustion doctrine presupposes the existence of adequate state remedies through which defendants can seek review of their federal and state claims. Young v. Ragen, 337 U.S. 239, 238-39 (1949); cf. Case v. Nebraska, 381 U.S. 336 (1965). Virginia's arbitrary application of its procedural bars to habeas petitions

subverts the principles underlying comity. Habeas corpus is not available as an avenue for exhaustion, nor does Virginia provide an alternative form of post-conviction review. This Court should grant certiorari to halt any further erosion of the principle of comity by the Commonwealth of Virginia.

State post-conviction review must be coextensive with federal habeas corpus review to promote comity and lessen federal-state tensions. Without co-extensive state and federal review, federal habeas courts will typically find themselves evaluating claims that had never been presented to state courts in the first instance, because the relevant state statute barred a petitioner from raising the federal nature of the claim.[9]

Federal appellate courts frequently express their frustration that inadequate state post-conviction review results in increased federal habeas filings. See, e.g., United States ex rel. Williams v. Brantley, 502 F.2d 1383, 1387 (7th Cir. 1974) (respect for the constitution not fostered by state post-conviction procedure that forecloses post-conviction review of any constitutional issue if the defendant chose to appeal his conviction); Keener v.

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[9] A rudimentary axiom of habeas corpus procedure requires that a state prisoner present the federal nature of her claim to the state court in order to fulfill the exhaustion requirement. Picard v. Connor, 404 U.S. 270, 275 (1971).

Ridenour, 594 F.2d 581, 590 (6th Cir. 1979) (cautioning that so long as Ohio Post-Conviction relief is not co-extensive with federal statutory habeas corpus, federal courts must repeatedly review merits of constitutional claims that have not been addressed by state courts).

The Seventh Circuit, in Gray v. Greer, 707 F.2d 965, 967 (7th Cir. 1983) criticized Illinois adoption of the "damned if you do, damned if you don't" approach to state habeas.[10] which requires the federal habeas court to waive the exhaustion requirement in order to consider the merits of a constitutional claim. Should Virginia continue to apply Hawks as a res judicata bar to claims raised in a first habeas petition, the petitioner's only redress will be to seek review in the first instance on federal habeas, thereby fostering the implosion of the exhaustion doctrine.

Moreover, this Court has expressed a predilection toward allowing states to bear the primary burden for administrating their criminal law. See, e.g., Coleman v. Thompson, supra, 111 S.Ct. at 2254; Case v. Nebraska, 381 at

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[10] Virginia's application of its procedural bars is more restrictive than the Illinois approach. Illinois provides an exception that allows the court to relax the res judicata bar and review the merits of a claim when "fundamental fairness" so requires. Gray, 707 F.2d at 968. Although O'Dell urged the Virginia court to rule on certain of his claims "in the interests of justice," the Court refused to abide by these requests.

344. Congress has expressed the same preference. For example, 28 U.S.C. § 2254(d) requires a federal habeas court to defer to a state habeas court's findings of fact. However, a federal court need not defer to the state court if the petitioner was not afforded a full and fair hearing in state court. 28 U.S.C. § 2254(d). Virginia has shirked its responsibility in this area by applying procedural bars to claims which merit factual findings.

O'Dell did not receive a full and fair hearing on his habeas petition. Although O'Dell received a hearing on two of the claims, the presiding judge, rather than enter factual findings, simply applied the Hawks bar to consideration of the DNA evidence as a means of escaping his duty to adjudicate the claim. (October 23 hearing at pages 261-62, reprinted at pages a91-a92 of the Appendix.) The federal habeas court will necessarily hold a de novo evidentiary hearing on the factual issues underlying many of O'Dell's claims because of the state court's abrogation of its responsibility to provide O'Dell with full and fair hearings.

Additionally, the habeas court's application of Hawks as a means of "ducking" certain federal claims presented by O'Dell is an abrogation of its responsibility to promote comity and "to guard and enforce every right secured

by the constitution." Mooney v. Holohan, 294 U.S. 103, 113 (1935). A state court must provide a defendant with reasonable opportunity to raise a federal question or the doctrine of exhaustion would be rendered a nullity. See Picard v. Connor, 404 U.S. 270, 275 (1971).

On direct appeal, the Virginia Supreme Court never considered the federal basis of a number of O'Dell's claims.[11] The habeas court cannot merely ignore the federal basis of the majority of O'Dell's habeas petition by applying Hawks as a res judicata bar when the alleged constitutional violations have not been addressed.

Even the judge who applied Hawks recognized the serious constitutional implications of O'Dell's claim regarding the prosecution's misstatements about O'Dell's parole eligibility. After hearing arguments on the issue, the habeas judge opined, "I tell you what I'm going to do for you. I'm going to dismiss it and you can let the

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[11] Aside from the claim regarding O'Dell's parole ineligibility, the published opinion on direct appeal fails to reach the federal grounds of numerous other claims raised in the appellate briefs, including: the validity of the waiver of counsel; inadequate warnings of self-representation; improper limitation of cross-examination of Commonwealth experts; the discharge of Peter Legler; the disproportionate slant of the voir dire questions regarding the probability of the death penalty; improper limitation on the cross-examination of Watson; the failure to instruct the jury on the definition of mitigating evidence and the erroneous admission of the serological evidence.

federal boys rule on it. I think it worthy of an answer frankly. I mean that in all seriousness." (August 22, 1989 hearing pages 81-82, reprinted in Appendix at pages a34-a35) Judge Spain was laboring under a misconception, however, when he stated that "I think its going to come in a federal court . . . if it's a federal question when I think its ultimately going to end up in a federal writ, and let the federal courts rule at that point." (Id. at page a35) Judge Spain subsequently clarified that Hawks was grounds for his dismissal. (January 31, 1990 order, reprinted in Appendix at page a19).

We submit that not only did the court erroneously apply Hawks, but that the Virginia's adoption of the "damned if you do -- damned if you don't" approach to habeas corpus is a direct assault on the principles of comity inherent in the nexus between federal and state post-conviction review -- the exhaustion doctrine.

B. Virginia May Not Apply Its Procedural Rules in an Unconstitutional Manner.

While petitioner recognizes that this Court has ruled that collateral review proceedings are not constitutionally required, Murray v. Giarratano, 492 U.S. 1, 10 (1989), once a state has created a substantive right to adjudicate a claim it is bound to administer its procedural

rules within the confines of the Fourteenth Amendment. See, e.g., Logan v. Zimmerman, 455 U.S. 422 (1982), Hicks v. Oklahoma, 447 U.S. 343 (1980), Roberts v. LaVallee, 389 U.S. 40 (1967) (per curiam). The Virginia Court's application of Hawks as a res judicata bar denied O'Dell his state-created right to post-conviction review.

In Logan v. Zimmerman, supra, this Court found that the state, once it created a forum for litigating a claim, could not arbitrarily deny the litigant the opportunity to exploit the remedy. Logan 455 U.S. at 429-30. The Logan court consequently found that the dismissal of the petitioner's employment claim because of a scheduling error violated due process. Id. at 437. See also Hicks v. Oklahoma, 447 U.S. 343, 346 (1980) (state created liberty interest to be sentenced within the jury's discretion cannot be arbitrarily extinguished).

The Virginia Supreme Court has stated that "[i]t is well settled that the deprivation of a constitutional right of a prisoner may be raised by habeas corpus." Griffin v. Cunningham, 205 Va. 349, 355, 136 S.E.2d 840, 845 (1964). Virginia's application of Hawks as a res judicata bar to effectively foreclose O'Dell's use of Virginia's habeas corpus and thereby denies O'Dell the opportunity to fully exploit the state created remedy. The habeas court's

action is directly analogous to the state action in Logan. Consequently, as this Court held in Logan, Virginia has unconstitutionally applied its procedural rules.

Roberts v. LaVallee, supra, (per curiam) is also analogous. Roberts, this Court found a New York statute unconstitutional in that it created unequal access to transcripts of a preliminary hearing. While the Roberts court did not explicitly hold that the defendant had a constitutional right to a preliminary hearing, id. at 42, it nonetheless found that equal protection required New York to provide equal access to a transcript of that hearing. The import of Logan and Roberts is clear -- a state's application of a procedural rule must satisfy the requirements of the constitution.[12] The Court should grant certiorari to correct the misperception of the Virginia jurists regarding their obligation to enforce their procedural rules to protect rather than deny criminal defendants their rights secured by the United States Constitution.

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[12] This Court subscribes to a corollary rule that novel or sporadically applied state procedural rules are insufficient to preclude federal habeas review. See, e.g., NAACP v. Alabama ex. rel. Patterson, 357 U.S. 449, 457-58 (1958); Barr v. City of Columbia, 378 U.S. 146, 149 (1964).

III.

THE HABEAS COURT ERRONEOUSLY CONCLUDED THAT O'DELL'S WAIVER OF COUNSEL WAS CONSTITUTIONAL

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Gideon v. Wainwright, 372 U.S. 335 (1963). The constitution also guarantees the defendant's right to waive counsel and represent himself, but only if the waiver of counsel is knowing, intelligent and voluntary. Faretta v. California, 422 U.S. 806 (1975). An accused's right to effective assistance of counsel is violated if the procedure used to insure that his waiver of that right is fundamentally defective. See Johnson v. Zerbst, 304 U.S. 458, 465 (1938). This Court should grant certiorari in this case to vacate O'Dell's conviction, which was obtained on the basis of a defective waiver of counsel.

The habeas judge erroneously concluded that the precedent of this Court does not require that O'Dell, a man with a history of psychiatric problems, be examined by a psychiatrist before waiving counsel. The habeas judge further erred by assuming that the examination, if inadequate, did not prejudice O'Dell. Clearly, O'Dell's pro se status alone significantly contributed to his conviction. Finally, the habeas court erred in accepting the findings of

defendant's court appointed examining psychiatrist as sufficient, despite the fact that the psychiatrist (1) was unqualified to conduct the evaluation as to his competency, (2) evaluated O'Dell on statutorily deficient information and (3) failed to even evaluate O'Dell specifically on his competency to represent himself. Additionally, the trial court abrogated its constitutional responsibility to re-evaluate O'Dell's competency to represent himself when O'Dell's irrational behavior became manifestly evident during the course of the trial.

A. The Deficient Examination.

Petitioner submits that the habeas court erroneously ruled that the decisions of this Court did not require a psychiatric examination of O'Dell prior to the trial court's acceptance of his waiver of counsel.

In Westbrook v. Arizona, 384 U.S. 150 (1966) (per curiam), this Court differentiated between a defendant's competency to stand trial and his competency to waive his right to counsel and proceed pro se. The Court vacated the judgment of conviction as the petitioner in Westbrook had not been afforded a hearing on the latter. Id. at 151. Although, as the habeas court noted, Westbrook does not require a psychiatric examination of a defendant prior to waiving counsel in every instance nonetheless, due process

requires an examination of the defendant if circumstances so dictate. See Pate v. Robinson, 383 U.S. 375 (1966).

The habeas court misinterpreted the import of this Court's decisions in Pate and Westbrook -- psychiatric examinations are constitutionally required if the defendant's demeanor prior to trial compounded with his behavior at trial, raises a question as to his competency. See Drope v. Missouri, 420 U.S. 162, 181 (1985). The habeas judge's reliance on the hyper-technical finding that a psychiatric examination is not universally necessary before a defendant can waive his right to counsel avoids the logic underlying these opinions. O'Dell's erratic behavior and psychological history necessitated an evaluation of his competency. The habeas judge should not have accepted Dr. Kreider's evaluation as sufficient on either O'Dell's competency to stand trial or to proceed pro se. Even if Dr. Kreider's conclusion that O'Dell was competent to stand trial was valid, this was far from determinative on the issue of O'Dell's competency to represent himself, a determination which requires a finding of higher level of competency. See Westbrook 384 U.S. at 150.[13]

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[13] The testimony elicited at the October 23, 1990 evidentiary hearing clearly demonstrates that Dr. Kreider's examination failed to even satisfy the fundamental requirement of an evaluation for competency to stand (continued...)

Dr. Kreider's determination was deficient both as a matter of the Virginia law, which requires that the prosecution and defense provide specified information to the examining psychiatrist, Va. Code Ann. §§ 19.2-169.1(C), .5(C), and additionally, as a matter of professional standards.

Dr. Kreider was thoroughly unfamiliar with the mental stamina necessary to effectively represent oneself -- heightened by the fact that O'Dell's life was on the line. Dr. Kreider failed either to diagnose or identify deficiencies in O'Dell's psychopathology that at a minimum seriously handicapped his performance as pro se counsel. Ignorant of disabilities that would significantly affect his capacity to represent himself, O'Dell was not fully aware of the risks of self-representation, thus could not have made the knowing and intelligent waiver of counsel required by Faretta. To compound matters, the trial court failed to described specifically to O'Dell the complexities of trial procedures and the stern ramifications of failing to comply with those procedures including the limitation on appellate review.

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[13] (...continued)
trial, see Dusky v. United States, 362 U.S. 402 (1960) (per curiam), or of O'Dell's mental state at the time of commission of the alleged offenses.

Moreover, the habeas court erroneously found that the insufficient examination did not prejudice O'Dell. At the October 23, habeas hearing two experts in the field of forensic psychology both testified that Dr. Kreider's examination of O'Dell was insufficient. In addition, evidence of O'Dell's behavior during the criminal trial supports his claim that if all appropriate information had been given to Dr. Kreider, or if Dr. Kreider had conducted a proper forensic examination according to generally recognized medical standards, the outcome of the competency to waive counsel analysis may well have been different.

B. The Trial Court Should Have Revisited the Determination of O'Dell's Competency.

The habeas court ruled that the trial court did not err in failing to revisit the issue of O'Dell's competency. Specifically, the habeas court found that competency only need be revisited in extreme cases. To the contrary; once a trial court has initially determined that defendant is competent, the court is under continuing obligation to act promptly to revisit the issue if circumstances "suggest[] a change that would render the accused unable to meet the standards of competence to stand trial." Drope v.

Missouri, 420 U.S. at 181 (1975).[13] Here, the trial judge's professed observations on O'Dell's demeanor, compounded with Mr. Ray's pleas that O'Dell needed additional evaluation demonstrated the need per Drope to revisit the competency issue. The trial court, in failing to revisit the issue of O'Dell's competency thus breached its continuing obligation to monitor O'Dell's competence to continue pro se.

The Court should have monitored O'Dell with vigilance especially when, as here, the accused conducts his own defense in a capital trial. It is quite clear from the record, that O'Dell's rationality deteriorated during proceedings. The trial court, on notice of O'Dell's psychiatric history, should have ordered a full scale inquiry into O'Dell's competency to defend himself. The court's omission in this regard is clear constitutional error.

The initial deficiency of Dr. Kreider's examination compounded with the trial court's abdication of its

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[13] The habeas court created a false distinction between revisiting competency to stand trial and competency to waive counsel. The habeas court limited the application of Drope to competency to stand trial. (October hearing pp. 248-49, reprinted in Appendix at pages 78a-79a). Any distinction is unwarranted. Competency to represent oneself requires a higher level of mental stability than competency to stand trial and therefore demands heightened scrutiny. See Brewer v. Williams, 430 U.S. 387, 404 (a court should engage in every reasonable presumption against a waiver of counsel).

responsibility to continually monitor defendant's competency violates O'Dell's constitutional right to the effective assistance of counsel. This Court should grant certiorari to vacate the judgment of the Virginia Court and allow O'Dell a new trial at which he may be represented by competent counsel.

IV.

THE VIRGINIA SUPREME COURT'S DISMISSAL OF O'DELL'S HABEAS PETITION DOES NOT DEPRIVE THIS COURT OF JURISDICTION

Petitioner recognizes that a question of federal law dismissed by a state court judgment pursuant to independent and adequate state rule of procedure forecloses this Court's ability to review the federal question. Coleman v. Thompson, ___ U.S. ___, 111 S. Ct. 2546, 2553-54 (1991). Petitioner submits, however, that the Virginia Supreme Court's dismissal of O'Dell's appeal from the Circuit Court's dismissal of his habeas corpus petition was not sufficiently independent or adequate under this Court's pronouncements in Ake v. Oklahoma, 470 U.S. 68 (1985) and James v. Kentucky, 466 U.S. 341 (1984) to bar reviews by this Court.

The dismissal of O'Dell's petition for appeal was not independent of federal law, as consideration of O'Dell's

motion papers prior to the dismissal of his petition for appeal implicated an "antecedent ruling on federal law." Ake v. Oklahoma, 470 U.S. at 75. The Virginia Supreme Court has extended the time for filing a petition for appeal from a denial of a writ of habeas corpus when "it is found that to deny the extension would abridge a constitutional right." Tharp v. Commonwealth, 211 Va. 1, 3, 175 S.E. 2d 277, 278 (1970) (per curiam). Given that O'Dell relied on Tharp as a basis for obtaining relief in his motions to the Virginia Supreme Court, that Court necessarily considered whether a federal constitutional right would be dishonored before denying O'Dell's motion to perfect his appeal. Petitioner submits that the dismissal of the appeal consequently does not bar this Court's review of the state court judgment.[15]

Coleman v. Thompson, decided by this Court last June, is factually inapposite to O'Dell's petition. In Coleman, this Court rejected petitioner's contention that Ake applied to the Virginia Supreme Court's dismissal of petitioner's appeal for failure to file a timely notice of appeal.

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[15] Should this Court find that it possesses jurisdiction to review O'Dell's claims, it need not remand the case to the Virginia Supreme Court, but rather, may immediately address the merits raised by O'Dell's petition. NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 301 (1964).

However, this Court, in Coleman, held that the rule in Tharp requiring the Virginia Supreme Court to consider whether a Constitutional right was abridged before granting an extension of time only applied, if at all, to Petitions for Appeal. Coleman, 111 S. Ct. at 2561. Tharp clearly creates an exception for an untimely filing of a Petition for Appeal. O'Dell filed a timely notice of appeal and timely "Assignments of Error." O'Dell sought to supplement the filings with a "Petition for Appeal." Consequently, the Virginia Supreme Court, under the Tharp rule, must have weighed the federal constitutional claims raised by O'Dell in his motion to file a delayed Petition for Appeal.

Nor did the Virginia Supreme Court's dismissal of O'Dell's petition rest on an adequate state ground as the Virginia Supreme Court Rules fail to give appropriate notice to litigants. Counsel's belief that the "Assignments of Error" was the proper document to file was based on a rational reading of the Virginia Supreme Court Rules. The Commonwealth, however, offered a different, yet nonetheless rational reading of the rules. These equally tenable, albeit conflicting interpretations of the Virginia Supreme Court Rules indicate that the rules fail to give appropriate notice to litigants, thus rendering the dismissal ineffec-

tive as an adequate state procedural bar precluding this Court's review. See James v. Kentucky, 466 U.S. 341, 348-49 (1984) (only firmly established state procedural rules interpose a bar to the adjudication of federal constitutional claims by this Court).

Prior to 1985, there was substantial confusion surrounding the proper place to appeal a denial of a habeas corpus petition in Virginia. At least in non-capital cases, final decisions in habeas corpus matters, were appealable as of right to the Court of Appeals, and further review after a Court of Appeals decision was by Petition for Appeal to the Virginia Supreme Court. See Titcomb v. Wyant, 228 Va. lvii, 323 S.E.2d 800 (1984); Peterson v. Bass, 2 Va. App. 314, 343 S.E.2d 475, 477-78 (Va. Ct. App. 1986). In 1985, the Virginia legislature amended Virginia Code § 17-116.05:1(B) to make habeas corpus decisions in capital cases appealable directly to the Virginia Supreme Court. Subsection (B) now provides:

> In accordance with other applicable provisions of law, appeals lie directly to the Supreme Court from a conviction in which a sentence of death is imposed, from a final decision, judgment or order of a circuit court involving a petition for a writ of habeas corpus, from any final finding, decision, order, or judgment of the State Corporation Commission, and from proceedings under §§ 54.1-3935 and 54.1-3937. Complaints of the Judicial Inquiry and Review Commission shall be filed with the Supreme Court of Virginia. The Court of Appeals shall not have jurisdiction over any cases or proceedings described in this subsection.

The underscored language is that added by the 1985 amendment. 1985 Va. Acts C.371.

The words of the statute -- "appeals lie directly to the Supreme Court" -- suggest an appeal as of right, rather than a discretionary Petition for Appeal. Moreover, every other kind of case listed in subsection B -- convictions in death penalty cases, final decisions of the State Corporation Commission, and attorney disciplinary proceedings -- is an appeal "of right" to the Virginia Supreme Court. See, e.g., Howell v. State Corp. Comm'n, 214 Va. 128, 198 S.E.2d 611 (1973) (per curiam); Va. Code Ann. § 17-110.1.

Rule 5:17 of the Virginia Supreme Court provides: "In every case in which the appellate jurisdiction of this Court is invoked, a petition for appeal must be filed . . . ." However, Rule 5:17 is not universal as no Petition for Appeal is required in any of the other kinds of appeals mentioned in Subsection (B). Va. Sup. Ct. R. 5:21, :22. Counsel therefore reasonably concluded that the kinds of appeals mentioned in Subsection (B) -- appeals as of right from the Virginia Circuit Courts to Virginia Supreme Court -- constituted an exception to the generalized requirement of Rule 5:17.

The Virginia Supreme Court, however, interpreted the Rules differently. Although petitioner accepts the Virginia Supreme Court's statement as decisive regarding its own jurisdiction, the ambiguity of the Rules precludes their operation as a bar to this Court's jurisdiction to review the merits of O'Dell's claim. James v. Kentucky, 466 U.S. at 348-49.

Additionally, as O'Dell complied with the purpose of the Petition for Appeal by giving the Virginia Supreme Court notice of its arguments on appeal to that Court, the application of the procedural rule was pointlessly severe, and consequently incompetent as a jurisdictional bar to review. NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 297 (1964).

As the Virginia Supreme Court's dismissal of O'Dell's habeas petition rests on an inadequate and insufficient state ground, we submit that this Court has jurisdiction to review the merits of O'Dell's claims presented in this petition.

CONCLUSION

For all of the reasons stated herein, Petitioner Joseph O'Dell, III respectfully requests that his petition for a Writ of Certiorari be granted to review the orders of the Virginia Supreme Court.

Dated: New York, New York
September 3, 1991

Respectfully submitted,

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